The final order of affirmance of the Court of Appeals of the State of New York, sought to be reviewed was made and entered on the 13th day of March, 1959, and the last day that petitioner has to file his Petition for Certiorari and brief in support thereof, is ninety days from the entry of said order or June 11, 1959. (See Section 2101(c) of Title 28 of the United States Code.)

The Association of Private Hospitals, Inc., is a domestic membership corporation consisting of thirty-seven (37) member proprietary hospitals, most of whom are located in the metropolitan zone of New York City and are vitally affected by the provisions of the Hospital Code of the City of New York in effect since October 1, 1956, and specifically by the provisions of Section 56, Subdivision 4(b) thereof, which increases the floor area of each bed in other than single rooms to seventy (70) square feet per bed irrespective of the fact that all the member hospitals of the *amicus curiae* were built and operated prior to October 1, 1956, in accordance with the then prevailing regulations which required that "all beds used for patients shall be at least three feet apart where arranged in series and at least two feet from lateral adjoining walls" (Article V of the Regulations governing the establishment and maintenance of private proprietary hospitals in effect for approximately 25 years prior to and until October 1, 1956).

The real estate and equipment owned by the member hospitals of the *amicus curiae* have a money value in excess of seventy-five million ($75,000,000.00) dollars. These hospitals presently provide hospital care for approximately 20% of the paying patients hospitalized in the City of New York with a bed capacity of 4,548 as last reported in the Report of the General Inspector of the Department of Hospitals of the City of New York, as of January 15,

1958. The member hospitals cater only to private patients and absorb about 25% of the Blue Cross load. There are no ward patients in these hospitals and the bulk of the rooms are of semi-private nature consisting mostly of 2 beds in a room with an average floor area per bed of 60 square feet.

The Hospital Code in effect since October 1, 1956, would, if enforced, compel the member hospitals of the *amicus curiae* to reduce their bed capacity by a substantial percentage, estimated to be 20% at least, thus depriving the owners of these hospitals of their property without due process of law in violation of their federal constitutional rights, and also depriving the public of the use of approximately 910 beds per day and thus loading the already sorely overcrowded city and voluntary hospital fields not covered by any limitations as to bed or nursing service with the necessity to take care of these additional patients, who would not be able to be taken care of by private proprietary hospitals presently in operation in the City of New York, if the provisions of Section 56 (4) (b) were declared by this Court to be constitutional and thus enforcible by the respondent herein. Actually since the bulk of the rooms in the member hospitals are semi-private and contain 2 beds per room, the member hospitals, if compelled to comply with the provisions of Section 56, subdivision 4(b), would have to remove one bed from each semi-private room, thus being forced to provide 120 square feet per bed rather than the 70 square feet required unless of course they undertake major construction changes such as breaking down walls, etc., a task of a nature not possible in a hospital institution unless all patients are removed and the hospital is closed for the period of the major alteration. Aside from the financial hardship that such an alteration would impose on the operators, the harm to the public by being deprived of

the use of these hospitals during the period of the required alterations would be very great.

Argument

The *amicus curiae* shall not in this brief repeat the argument made by the petitioner nor cite cases already referred to in the petition for a writ of certiorari. The *amicus curiae* agrees with the major premise raised, namely, that the bed area requirements as provided by the Code and *required of private proprietary hospitals* only are discriminatory and violate the due process clause of the Federal Constitution.

The *amicus curiae* contends that the only issue before this Court is, whether or not the new standards as to bed area of the Code reasonably relate to the protection of patients' health and safety when such requirements are limited only to private patients *with a choice of selection of hospital accommodations* and are not applicable to city and voluntary hospitals where no such choice exists.

Respondent cited in the Court of Appeals of the State of New York *Matter of Spielvogel* v. *Ford*, 1 N. Y. 2d 558, 562 (1956), in support of its contention that the challenged sections of the Code are constitptional. However the very language of that cited case supports the petitioner's position rather than respondent's position. That Court there stated *inter alia*:

> 'Courts strike down statutes only as a last resort (citing cases), and only when unconstitutionality is shown beyond a reasonable doubt (citing cases). *But, for all that, due process demands that a law be not unreasonable or arbitrary and that it be reasonably related and applied to some actual and manifest evil* (citing cases). And even though a

police power enactment may have been or may have seemed to be valid when made, *later events or later-discovered facts may show it to be arbitrary and confiscatory* (citing Abie State Bank v. Bryan, 282 U. S. 765; 772).' (Italics ours.)

Certainly in the instant case, the very requirement that *only* private proprietary hospitals increase their standards by providing additional floor area per bed in other than single rooms, when no such requirement is made or demanded of city and voluntary hospitals, makes these provisions unreasonable and arbitrary.

There is no logical basis for the respondent's argument urged in the Court of Appeals that the provisions of Section 56, Subdivision 4(b) restricting the floor area of beds in rooms other than single when limited to private proprietary hospitals only are reasonably related to the protection of public health, nor can the *amicus curiae* agree with the argument of the respondent urged below that "It is conceivable that when profit is the primary motive of a hospital's operators, they would be more prone to overcrowd it, and to understaff it, than would be a hospital administration not so motivated". The *amicus curiae* does not find fault with the right, power and duty of the Board of Hospitals to establish and promote the highest possible standards for the care of the sick, injured, aged and infirm persons, but it urges that any rules establishing such standards must be consistent with the Constitution, the Statutes of the State of New York and with the New York City Charter. To single out private proprietary hospitals and impose restrictive standards on them alone in the alleged interest of public health when no such standards are established for other hospital institutions over which The Board of Hospitals has jurisdiction is clearly discriminatory and is inconsistent with the Constitution.

The yardstick used by the respondent such as "profit motive" is irrelevant and highly speculative and not based on any objective finding of facts. If the protection of the public health requires that the floor area per bed in other than single rooms should be seventy (70) square feet, then such a requirement in order to protect the public must apply to *all* hospitals under the jurisdiction of the respondent and not only to a small segment of such hospitals. Otherwise we have class legislation rather than legislation to protect the general public.

It has been argued by the respondent below that the jurisdiction of the Board of Hospitals is limited to private proprietary hospitals and that therefore it, The Board of Hospitals, is limited to regulating private proprietary hospitals only and cannot impose the same standards on city or voluntary hospitals. It is respectfully submitted that that is not so. The Court's attention is respectfully directed to the following applicable statutes:

Article 1 of the Hospital Code in effect October 1, 1956, Section 2 thereof, under the headline "Purpose", reads as follows:

> "The purpose of this code is to state the rules and regulations adopted by the Board of Hospitals of the City of New York in order to exercise the jurisdiction conferred upon it by the New York City Charter."

The *New York City Charter, Section 583a,* subdivision "a" provides that The Board of Hospitals was created by virtue of The New York City Charter, Chapter 23, Sec. 582-2, Subd. "a" (fol. 372 of Papers on appeal).

> "*Section 583-a.* Jurisdiction of department.
>
> (a) The department shall:

1. Maintain and operate all hospitals, sanatoria, almshouses or other institutions of the City for the care of sick, injured, aged or infirm persons, except as otherwise provided by law, and shall have charge and control of the ambulance service provided by the city, and, except as otherwise provided by law, over any psychopathic service for the examination, observation and treatment of persons and over any other service maintained by the city for the care of sick, injured, aged or infirm persons as may be assigned to the department or the commissioner by law." • • •

"*Section 583-b.* Powers and duties of the board of hospitals.—The board of hospitals shall have the power and duty to:

a. Develop and maintain long range programs of hospital service for the care of sick, injured, aged and infirm persons who are the responsibility of the department.

b. Establish and promote the highest possible standards for the care of sick, injured, aged and infirm persons to be complied with by institutions under the jurisdiction of or subject to licensing by the department *and by institutions which care for any such persons at the expense of the City;* (italics ours)

c. Develop, establish and promote standards and methods for increasing the efficiency of operation, maintenance and management of facilities for the care of sick, injured, aged and infirm persons *in institutions under the jurisdiction of the department;* • • • " (fols. 332, 369-371 of Papers on appeal). (Italics ours.)

"*Section 583-d.* Hospital Code.—

a. The board of hospitals is hereby authorized and empowered to promulgate a hospital code and from time to time to add to and to alter, amend or repeal any part of such code. Such hospital code shall consist of such rules and regulations, *not inconsistent with the constitution or the laws of this state or with this charter,* as may be necessary to carry out the powers and duties vested by law in the department of hospitals and the board of hospitals * * *" (fols. 333, 372-373 of Papers on appeal). (Italics ours.)

A mere reading of the above quoted sections of The New York City Charter and of Article 1, Section "2" of The Hospital Code, clearly shows that the jurisdiction of the Board of Hospitals, the promulgator of The Hospital Code in question, extends to the establishment and promotion of "the highest possible standards for the care of sick, injured, aged and infirm persons to be complied with by institutions under the jurisdiction of or subject to licensing by the department (private proprietary hospitals and nursing homes) *and by institutions which care for any such persons at the expense of the City.*" (Italics ours.) It should be noted that only city hospitals and/or voluntary hospitals qualify for the designation of "institutions which care for any such persons at the expense of the City".

In order that there may be no doubt in the minds of the members of this Court that the Department of Hospitals of the City of New York operates and has under its jurisdiction fifteen (15) general city hospitals and thirteen (13) special hospitals, with an overall bed capacity of 19,899 beds, and that the Board of Hospitals, the promulgator of the challenged Hospital Code, is an adjunct of

the Department of Hospitals, to wit, its policy-making body, there are annexed to this brief, marked Exhibit "A" and made a part thereof, excerpts from the Annual Report of the Department of Hospitals of the City of New York for the year 1957 which conclusively show that all of the City hospitals with a bed capacity of 19,899 beds, not affected by the limitations imposed by Sections 48 and 56, Subd. 4(b) of The Code are under the jurisdiction of the respondent and the Board of Hospitals of the City of New York.

It is therefore self-evident that at least the City hospitals with a bed capacity of 19,899 beds, which are certainly under the jurisdiction of The Board of Hospitals, are concededly not covered by the provisions as to floor area as required of the private proprietary hospitals in the City with a bed capacity of only 4,548 beds and that therefore the argument that these provisions are necessary to protect the public health is clearly not applicable and in the language of the Court of Appeals in *Matter of Spielvogel, supra*, are unreasonable and arbitrary and are not reasonably related to some actual and manifest evil.

The Hospital Code and specifically Section 56(4)b thereof is repugnant to the Fourteenth Amendment and to Section 10 of Article 1 of the Federal Constitution.

CONCLUSION

The provisions of the Hospital Code of the City of New York, specifically Section 56, subd. 4(b) thereof should be declared unconstitutional and unenforcible by this Court and petitioner's application for a writ of certiorari should be granted.

Respectfully submitted,

RAYMOND RUBIN,
Attorney for Amicus Curiae.

Exhibit "A"

CITY OF NEW YORK

DEPARTMENT OF HOSPITALS

ANNUAL REPORT
For the Year
1957

MORRIS A. JACOBS, M. D.
Commissioner

HOSPITAL SERVICE AS DEFINED BY THE CHARTER OF THE CITY OF NEW YORK

Care and Treatment of Patients (Section 587)

"The hospitals or other institutions under the jurisdiction of the Department* shall be primarily for the care and treatment of the indigent sick of the City and for the protection of the public health, but the Department may receive for care and treatment in any hospital or other institution other sick or injured persons and temporarily may receive therein persons alleged to be insane under regulations made by the Commissioner.

A patient in a hospital or other institution under the jurisdiction of the Department who is able to pay, in whole or in part, for care and maintenance, or, if such patient be dependent, a relative legally liable for his support and maintenance, shall be liable for and shall pay to the extent of his ability for such care and mainte-

*The Department of Hospitals.

nance in such hospital or other institution, and the Commissioner shall collect and transmit such payments to the treasurer."

BOARD OF HOSPITALS

As provided in the City Council's Local Law No. 98 (approved July 27, 1950), the Board of Hospitals is comprised of five physicians with "broad medical, public health and hospital background and experience" and five laymen "distinguished in community and business affairs," with the Commissioner of Hospitals as chairman. The Board of Hospitals is the policy-making body of the Department of Hospitals and is empowered to develop and maintain long-range programs for the care of the sick, injured, aged and infirm persons who are the responsibility of the Department. Meetings are held the third Wednesday of each month, excepting August. Committees set up within the Board, in accordance with the local statute are: Committee of Long-Range Planning, Committee on Hospital Code, Committee on Professional Standards, and Committee of Annual Operating Budget.

The original ten members of the Board were appointed for one, two, three, four or five year terms, so that each year the term of one physician and one layman would expire. The members of the Board of Hospitals are:

Dr. George Baehr
Dr. Charles A. Gordon
Dr. Willard C. Rappleye
Dr. Howard A. Rusk*
Mr. Louis Goldstein
Mr. David M. Heyman
Mrs. Albert D. Lasker
Mr. John J. Lynch
Mrs. Anna Rosenberg

Dr. Morris A. Jacobs, Chairman
Mrs. Estelle Rodman, Secretary

*one physician vacancy.

FUNCTIONS AND ORGANIZATION

The Department operated 15 general hospitals and 13 special hospitals during the year with an average bed complement of 19,899. Patients treated totaled 263,702 for 6,916,910 days' care—6,124,965 on the wards and 791,945 on home care. The average bed occupancy rate was 84.8 in all hospitals—81.4 in the general and 88.3 in the special hospitals. There were 33,636 births for 152,290 days' care. Clinic visits totaled 2,502,559. Emergency ambulances served 339,921 persons.

Full-time, per annum employees totaled 33,457, (excluding house staff and student nurses), and physicians and surgeons working on hospital staffs without pay about 9,000. The Department's total expense budget as approved by the Board of Estimate for the fiscal year 1957-1958 amounted to $147,405,321, including mental health activities.

The organizational structure stemming from the Commissioner included two Deputies, one in charge of medical and hospital services and the other of legal, labor and personnel activities and institutional inspection. The four major bureaus are Medical and Hospital Services, Administration, Supply, and Engineering & Maintenance. The Department's executive officers are:

Morris A. Jacobs, M. D., Commissioner of Hospitals
Henry I. Fineberg, M. D., Deputy Commissioner
Maurice H. Matzkin, Deputy Commissioner
Henry W. Kolbe, M. D., Director, Bureau of Medical and Hospital Services
Herman E. Bauer, M. D., General Medical Superintendent
J. Clarence Chambers, Jr., M. D., General Medical Superintendent

Benjamin G. Dinin, M. D., General Medical Superintendent
Robert J. Carlin, Director, Bureau of Administration
Simon Hillman, Director, Bureau of Supply
Jacob Lustig, Director, Bureau of Engineering & Maintenance
Estelle Rodman, Secretary to Department
William A. Ettel, Assistant to Commissioner

This report was prepared under the direction of William A. Ettel, Assistant to the Commissioner; Dr. Marta Fraenkel, Director of Medical Statistics and Records; Sue Halpern, Administrative Assistant in Public Relations.

GENERAL AND SPECIAL HOSPITALS

Hospital		*Location*	*Medical Superintendent***
Bellevue Hospital Center		Manhattan	Randolph A. Wyman
Bellevue General	(1)		
Bellevue Psychiatric	(2)		
Bellevue Tuberculosis	(3)		
Bird S. Coler Memorial Hosp. & Home	(4)	Welfare Island	Carolyn Silbermann
Bronx Municipal Hospital Center		Bronx	Emanuel Lifschutz
Abraham Jacobi General	(1)		
Abraham Jacobi Psychiatric	(2)		
Nathan B. Van Etten Hospital	(3)		
Coney Island Hospital	(1)	Brooklyn	Eva Vandow
Cumberland Hospital	(1)	Brooklyn	Louis Binder
Elmhurst General Hospital*	(1)	Queens	Isadore Firschein
Farm Colony	(5)	Staten Island	Samuel Steinholtz
Fordham Hospital	(1)	Bronx	F. Isabelle Kapp
Francis Delafield Hospital	(6)	Manhattan	Allen Kane
Goldwater Memorial Hospital	(4)	Welfare Island	C. George Scherf
Gouverneur Hospital	(1)	Manhattan	Bernard Rand
Greenpoint Hospital	(1)	Brooklyn	Saul Penner
Harlem Hospital	(1)	Manhattan	Bernard B. Nadell
James Ewing Hospital	(6)	Manhattan	Marianne Hahn
Kings County Hospital Center		Brooklyn	Harvey Gollance
Kings County General	(1)		
Kings County Psychiatric	(2)		
Kings County Tuberculosis	(3)		
Lincoln Hospital	(1)	Bronx	Sander V. Smith
Metropolitan Hospital Center	(1)	Manhattan	Ferdinand Piazza
Morrisania Hospital	(1)	Bronx	Nathan Smith
Queens Hospital Center		Queens	Philip Kahan
Queens General Hospital	(1)		
Triboro Hospital	(3)		
Riverside Hospital	(7)	North Brother Is.	Rafael Gamse
Sea View Hospital	(3)	Staten Island	Irving F. Klein
Sydenham Hospital	(1)	Manhattan	Pauline Matusow

(1) general hospital
(2) psychiatric hospital
(3) tuberculosis hospital
(4) chronic disease hospital
(5) custodial home
(6) cancer hospital
(7) teenage drug addiction hospital

* Opened March 18, 1957 as a replacement for City Hospital, Welfare Island.

** all superintendents are M.D.'s